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## BP MALAYSIA SDN BHD

**v.**

## ZABEDAH MOHAMED & ORS

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HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CIVIL SUIT NO: 22-135-2005(4)]
3 APRIL 2007

C ***CIVIL PROCEDURE:*** *Striking out - Statement of claim - Triable issues - Rules of the High Court 1980, O. 18 r. 19 - Whether raised - Whether forfeiture of a lease lawful and valid – Whether first defendant commenced action against plaintiff and obtained court order to enforce any right to forfeit - National Land Code, s. 234(2) - Whether second and*
D *first defendants wrongfully forfeited plaintiff's registered 35 year lease - Whether pleadings disclosed reasonable cause of action - National Land Code, s. 234(3)*

By way of a summons-in-chambers (encl. 39), the first and second
E defendants sought, *inter alia,* for the following orders: (i) that the plaintiff's statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 (the RHC) and/or under the inherent jurisdiction of the court because it disclosed no reasonable cause of action against the defendants; (ii) the
F honourable court to determine whether or not it has original jurisdiction to entertain the plaintiff's suit against the first and second defendants as the plaintiff was an aggrieved body by the decision and cancellation of the lease by the land administrator under the provisions of s. 313 of the National Land Code 1965
G ('the NLC') and (iii) all further proceedings in this action against the first and second defendants be stayed pursuant to s. 6 of the Arbitration Act 1952. According to the plaintiff's statement of claim, pursuant to a lease agreement dated 15 September 1994, the first defendant granted to the plaintiff a 35 year lease over a
H piece of land ('the land') for the annual rental of RM100,000. The total rental of RM3.5 million for the 35 years had been paid upfront by the plaintiff to the first defendant. The lease was for the purpose of the plaintiff constructing a BP service station. Thereafter the plaintiff appointed the first defendant as its dealer
I on the said BP service station pursuant to a Service Station License and Supply Agreement dated 15 December 1996. The agreement was terminated by a notice given by the plaintiff to the

first defendant on 21 February 2003 due to the latter's default in paying the monthly license fees to the plaintiff pursuant thereto. According to the plaintiff, upon termination of the agreement, the first defendant was obliged to vacate the land on which the BP Service Station was situated but she had refused to do so. Subsequently, the first defendant alleged breaches of the lease against the plaintiff and purported to forfeit the plaintiff's lease over the land. The plaintiff denied being in breach of the conditions of the lease and after conducting a land search discovered that the lease had been cancelled by the land administrator under the provisions of s. 313 of the NLC. The plaintiff thereafter filed the action herein against the defendants and prayed for, *inter alia*, an order that the purported forfeiture by the first defendant of the plaintiff's lease over the land and that the cancellation of the lease in favour of the plaintiff be null, void and unlawful and that the plaintiff's lease over the land be reinstated on the document of title thereto with immediate effect.

**Held (dismissing encl. 39 with costs):**

**(1)** The main issue in this action revolved around the question whether or not the forfeiture of the lease was lawful and valid. The determination of this issue must necessarily depend, *inter alia*, on whether or not the plaintiff had breached any of the provisions and conditions of the lease. The conflict of evidence on this issue showed that there was a triable issue and that there ought to be a trial of the action. (para 5)

**(2)** Even if there was a right of forfeiture, s. 234(2) of the NLC provides that forfeiture may be enforced either by re-entry onto the land or by action in the court. The first defendant had not commenced any action against the plaintiff and obtained a court order to enforce any right to forfeit the lease neither had the first defendant lawfully re-entered upon the land with the consent of the plaintiff. The facts pleaded in the plaintiff's statement of claim formed the basis for its contention that the first and second defendants had wrongfully forfeited the plaintiff's registered 35 year lease. The pleadings herein disclosed a reasonable cause of action. (paras 5 & 6)

**(3)** The fact that the first defendant was in receipt of the whole of the lease rental for the 35 year lease and had not refunded any of the lease rental to the plaintiff may constitute a waiver of the right of forfeiture pursuant to s. 234(3) of the NLC. The pleading raised some questions which required serious

consideration, and this was not a plain and obvious case for striking out the plaintiff's claim as disclosing no reasonable cause of action. The facts of this case were such that it could not be said that the plaintiff's claim was frivolous, vexatious or otherwise an abuse of the process of the court. (para 6)

**(4)** The first and second defendants had argued that the plaintiff had failed to comply with s. 418(1) of the NLC by appealing to the High Court instead of instituting this action. Section 418 was inapplicable to the facts of the present case as no decision was made by the land administrator and his action under s. 313 of the NLC was merely administrative in nature. The plaintiff was never heard when the application under s. 313 was made. No provision is contained therein for notice of such application to be given to the plaintiff. In addition, no decision of the land administrator was ever communicated to the plaintiff. The plaintiff discovered that the lease had been cancelled upon itself on its own motion conducting a land search with the land office. The plaintiff's case was that the first defendant had wrongfully and illegally forfeited its lease. Thus, s. 418 of the NLC was not applicable and that the action herein was properly filed by the plaintiff against the defendants for an order that the said forfeiture by the first defendant was wrongful and null and void; that the lease be reinstated and for damages.

**(5)** There is no power under the part of an arbitrator under the Arbitration Act 1952 to order specific performance of any contract relating to land or any interest in land. For that reason, the application for stay of proceedings pending arbitration was without any valid basis.

**Case(s) referred to:**

*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC* ***(refd)***

*Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337 CA* ***(refd)***

**Legislation referred to:**

Arbitration Act 1952, s. 6
National Land Code, ss. 234(2), (3), 313, 418(1)
Rules of the High Court 1980, O. 14A, O. 18 r. 19

**Other source(s) referred to:**

*Malaysian High Court Practice 2001,* Desk Edition, para 14A.1.3

*For the plaintiff - En Vinayaga; M/s Skrine*
*For the defendant - Pn Vijayaletchumi; M/s Vijaya Gopal & Assoc*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Azahar Mohamed J:**

**[1]** By way of a summons-in-chambers (encl. 39) dated 28 May 2006, and supported by an affidavit affirmed on 26 May 2006, the 1st and 2nd defendants sought, *inter alia*, for the following orders:

1. That the plaintiff's statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 (the RHC) and/or under the inherent jurisdiction of the court on the following grounds:

   (i) it discloses no reasonable cause of action against the defendants;

   (ii) it is frivolous and vexatious;

   (iii) it is an abuse of the process of the court;

2. This Honourable Court to determine the point of law ie, whether or not this Honorable Court has original jurisdiction to entertain the plaintiff's suit against the 1st and 2nd defendants, as the plaintiff was an aggrieved body by the decision and cancellation of the Lease dated 17 May 1996 *vide* Presentation No. 517 of 1996 Jilid 1 Folio 95 in question by the Land Administrator, Land Office, Johor Bahru, Johor, under the provisions of s. 313 of the National Land Code 1965 (the NLC).

3. All further proceedings in this action against the 1st and 2nd defendants are stayed pursuant to s. 6 of the Arbitration Act 1952.

**[2]** According to the plaintiff's statement of claim, pursuant to a Lease Agreement dated 15 September 1994 the 1st defendant granted to the plaintiff a 35 year lease over her land held under Geran Mukim 266 Lot No. 588 Tempat Sungei Melayu Mukim Pulai, Johor Bahru ('the land') for the annual rental of RM100,000. The total rental of RM3.5 million for the 35 years

had been paid upfront by the plaintiff to the 1st defendant. The lease was duly registered in the Land Office. The lease was for the purpose of the plaintiff constructing a BP service station. Thereafter, the plaintiff appointed the 1st defendant as its dealer on the said BP service station pursuant to a Service Station License and Supply Agreement dated 15 December 1996. The agreement, which was for a one year term, was thereafter renewed on a year to year basis by the plaintiff until it was terminated by a notice given by the plaintiff to the 1st defendant on 21 February 2003, according to the plaintiff, due to the latter's default in paying the monthly license fees to the plaintiff pursuant thereto. The plaintiff said that the 1st defendant had refused to pay the monthly license fees to the plaintiff since January 2001. According to the plaintiff upon termination of the Agreement, the 1st defendant was obliged to vacate the land on which the BP service station was but she had refused to do so.

Thereafter, the 1st and 2nd defendants brought an action in JB High Court Civil Suit No. MT1-22-160-2003 against the plaintiff on 25 March 2003 claiming *inter alia* the following:

a) specific performance of an alleged oral agreement whereby the 2nd defendant ought to be appointed as BP's dealer in replacement of the 1st defendant pursuant to a new service station agreement;

b) an order that the 2nd defendant be permitted to carry on business as a BP dealer on the land for the period of the 35 year lease;

c) the return of all excess monies collected in breach of the law from the 1st and 2nd defendants since the date of the agreement;

d) damages.

**[3]** The 1st and 2nd defendants in that action applied for injunctions against the plaintiff from interfering with them carrying on business as BP's dealer on the service station but the application was dismissed with costs by the court on 31 December 2003. After that, by a letter dated 10 September 2003, which was sent to the plaintiff's solicitors on or about 24 September 2003, the 1st defendant alleged breaches of the lease against the plaintiff and purported to forfeit the plaintiff's lease over the land. The plaintiff had denied being in breach of the

conditions of the lease. Next, according to the plaintiff its solicitors had conducted a land search on or about 3 December 2004 and found out, in late December 2004, that the lease had been cancelled by the Land Administrator Johore Bahru under the provisions of s. 313 of the NLC. After immediately lodging a caveat to protect the plaintiff's interest, the plaintiff's solicitor wrote to the land office to ask for an explanation how the lease could have been cancelled without any prior notice being given to the plaintiff and asked the Land Administrator to lodge a registrar's caveat to prevent any fraudulent dealing on the part of the 1st defendant. According to the plaintiff, no response was obtained from the Land Administrator. What follows thereafter was that the plaintiff filed the action herein against the defendants and prayed for the following orders:

a) an order that the purported forfeiture by the 1st defendant of the plaintiff's lease over all that land held under Geran Mukim 266 Lot No. 388 Tempat Sungei Melayu, Mukim Pulai, Johor Bahru is null and void and unlawful;

b) on order that the cancellation of the Lease *vide* Presentation No. 517/1996 Jilid No. 1 folio 95 in favour of the plaintiff over the land is null and void and unlawful;

c) an order that the plaintiff's lease over the land be reinstated on the document of title thereto with immediate effect; and

d) damages.

**[4]** It is trite law that the discretionary power to strike out an action summarily under O. 18 r. 19 of the RHC should only be exercised in plain and obvious cases where the case has no chance of success or is obviously unsustainable. This is well illustrated by the Federal Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7.

**[5]** To my mind, there are several problems with the arguments of learned counsel for the defendants that the plaintiff's action should be struck out on the ground that it disclosed no reasonable cause of action. In the first place, the main issue in this action revolves around the question whether or not the forfeiture of the lease was lawful and valid. The determination of this issue must necessarily depend, *inter alia*, on whether or not the plaintiff had breached any of the provisions and conditions of the lease. The conflict of evidence on this issue shows that there is a triable

issue and that there ought to be a trial of the action. Secondly, even if there was a right of forfeiture, it seems to me that s. 234(2) of the NLC provides that forfeiture may be enforced either by re-entry onto the land or by action in the court. For easy reference I reproduce the relevant provisions as follows:

**234. Power of forfeiture.**

(1) Every lease, sub-lease or tenancy exempt from registration, whether granted before or after the commencement of this Act, shalll, subject to any express provision therein to the contrary, be liable to forfeiture if the lessee, sub-lessee or tenant for the time being:

(a) breaches any of the provisions thereof, express or implied;

(b) is adjudicated bankrupt; or

(c) being a company, goes into liquidation.

(2) The forfeiture of any lease, sub-lease or tenancy may be enforced by the person or body for the time being entitled to the reversion thereon either by re-entry onto the land or by action in the Court, but subject in the former case to the provisions of any other written law for the time being in force.

(3) Where any lease, sub-lease or tenancy has become liable to forfeiture for breach of any of the provisions thereof, the acceptance by the person or body for the time being entitled to the reversion thereon of any rent falling due after the date of the breach, or the doing by that person or body of any other act showing an intention to treat the lease, sub-lease or tenancy as still subsisting, shall, unless that person or body was not at the time aware of the breach, and could not by reasonable diligence have been so aware, constitute a waiver of the right of forfeiture:

Provided that this sub-section shall not apply to anything done after the commencement of any action for forfeiture.

**[6]** In the present case the 1st defendant had not commenced any action against the plaintiff and obtained a court order to enforce any right to forfeit the lease neither had the 1st defendant lawfully re-entered upon the land with the consent of the plaintiff. The facts pleaded in the plaintiff's statement of claim formed the basis for its contention that the 1st and 2nd defendants had wrongfully forfeited the plaintiff's registered 35 year lease. That's why, in my view, the pleadings do disclose a reasonable cause of

action. Thirdly, the fact that the 1st defendant was in receipt of the whole of the lease rental for the 35 year lease and had not refunded any of the lease rental to the plaintiff may constitute a waiver of the right of forfeiture pursuant to s. 234(3) of the NLC. In my view, the pleading raised some questions, which required serious consideration, and that this is not a plain and obvious case for striking out the plaintiff's claim as disclosing no reasonable cause of action. The facts of this case are such that it cannot be said that the plaintiff's claim is frivolous, vexatious or otherwise an abuse of the process of the court.

**[7]** Which brings me to the 1st and 2nd defendants' alternative prayer, that is to say, for an issue of law to be determined without a full trial. In this regard, learned counsel for the 1st and 2nd defendants has argued that the plaintiff had failed to comply with s. 418(1) of the NLC by appealing to the High Court instead of instituting this action. That section reads as follows:

> **418. Appeals to the Court.**
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> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.
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> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.
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> (3) In this section "decision" includes any act, omission, refusal, direction or order

**[8]** In my view that s. 418 is inapplicable on the facts of the present case as no decision was made by the Land Administrator Johore Bahru and his action under s. 313 of the NLC was merely administrative in nature. The plaintiff was never heard when the application under s. 313 was made. No provision is contained therein for notice of such application to be given to the plaintiff. In addition, no decision of the Land Administrator was ever communicated to the plaintiff. The plaintiff discovered that the lease had been cancelled upon itself on its own motion conducting a land search with the land office. The plaintiff's case is that the 1st defendant had wrongfully and illegally forfeited its lease. Thus,

A in my view, s. 418 of the NLC is not applicable and that the action herein was properly filed by the plaintiff against the defendants for an order that the said forfeiture by the 1st defendant was wrongful and null and void; that the lease be reinstated and for damages.

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**[9]** Moreover, for an issue of law to be determined without a full trial under O. 14A of the RHC, the facts must not be in dispute. Order 14A that was introduced into the RHC by PU (A) 342/2000 states:

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> (1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:
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> (a) such question is suitable for determination without the full trial of the action; and
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> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
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> (2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.
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> (3) The court shall not determine any question under this order unless the parties have had an opportunity of being heard on the question.
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> (4) The jurisdiction of the court under this order may be exercised by a registrar.
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> (5) Nothing in this order shall limit the powers of the court under O. 18 r. 19, or any other provision of these rules.

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**[10]** Order 14A of the RHC enables the court to determine any question of law or construction of any document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein. The most authoritative statement of the law on O. 14A is to be found in the judgment of Mohd Noor Ahmad JCA (as His Lordship then was) in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337). In this respect, I would like to refer to *Malaysian High Court Practice 2001* Desk Edition at para 14A.1.3 where the learned writers said:

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The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action.

**[11]** It may be added that in an application under O. 14A, the question of law or construction should be in clear and precise terms. All parties concerned must make every effort to come to an agreement on all the necessary and material facts relevant to the question of law or construction of documents that the court is required to determine. In an application under O. 14A there is no room for any dispute between the parties as to the requisite material facts. The important point to note here is that in the present case all the necessary and material facts relating to the subject matter of the question had not been duly proved or admitted by the parties concerned.

**[12]** Finally, I shall now deal with the issue raised by learned counsel for the 1st and 2nd defendants that all further proceedings in this action be stayed pending arbitration pursuant to s. 6 of the Arbitration Act 1952. As I have pointed out earlier, in the present case the plaintiff is claiming that the forfeiture of the lease was unlawful and seeking to enforce its lease over the land by asking that it be reinstated. As I see it, there is no power on the part of an arbitrator under the Arbitration Act 1952 to order specific performance of any contract relating to land or any interest in land. For that reason, the application for stay of proceedings pending arbitration is without any valid basis.

**[13]** As a result, based on all the aforesaid reasons, encl. 39 was dismissed with costs.